PETITION WITH COUNTS DECLARING UNDER FEDERAL LAW AND UNDER STATE LAW.

The case of Wabash R. Co. *v.* Hayes, 34 Sup. Ct. 729, seems more a practical determination of a question than as based upon any principle of the common law or of any system of pleadings that a state or the government can devise.

It appears that an action was brought in Illinois under the Federal Employers' Liability law and upon the trial, the proof failing to show the injury occurred in interstate commerce, the lower court at defendant's request instructed the jury that the federal law had no application to the case. Over defendant's objection, the court then treated the allegation as to interstate commerce as eliminated and submitted the case to the jury under state law. Plaintiff recovered.

After saying the federal law, if it applied, was exclusive, the Supreme Court says: "The plaintiff asserted only one right to recover for the injury, and in the nature of things he could have but one. Whether it arose under the federal law or under the state law, it was equally cognizable in the state court; and had it been presented in an alternative way in separate counts, one containing and another omitting the allegation that the injury occurred in interstate commerce, the propriety of proceeding to a judgment under the latter count, after it appeared that the first could not be sustained, doubtless would have been freely conceded. Certainly nothing in the federal act would have been in the way."

It is then concluded that what the trial court did in elimination of the mistaken allegation as to interstate commerce was to give "effect to a rule of local practice, the application of which was not in anywise in contravention of the Federal Act."

And yet it does seem that the party brought his suit under federal law and failing to prove it, the court of its own motion, allows a failing case to stay in court under the law of another sovereignty, whose courts are entertaining the suit under their duty to the national sovereignty and in no way as of a citizen's right in his own sovereignty.

Is it true, that if plaintiff pleads a foreign contract and the proof shows a domestic contract, there would not be a failure of proof? Or if plaintiff proceeded upon an accident as happening in Illinois and the proof showed it happened in another state, say for example, where the action was brought? If it is true, then, all sorts of surprises could occur in a case, and for them defendant would be ill prepared.

And yet to say it would not, would not seem to be going beyond what is held in this case. The domain of operation of interstate commerce is just as much physical as is the territorial boundary of a state. An act is either within the boundary designated by Act of Congress or it is without it. The only difference is, that the lines are located within a state and shift from one point to another, but always their demarcation is clear or they do not exist at all. And where they operate they are just as exclusive, as the court says, as is state territory, of other state operation. The stand as to this just alike.

And it is no answer to our question to say "whether it (the case) arose under the federal act or under the state law it was equally cognizable in the state court." In the case we have supposed—whether the accident happens in the state where the action is pending or in another state—it is "equally cognizable in the state court."

The principle announced must rest on the fact, that Congress by giving to the state courts exclusive cognizance of cases under the Federal Employers' Liability Act, vests rights in citizens as such, thereby adding to state law another remedial provision, exclusive where it acts. But the nation seems to have no warrant in our system to grant such a thing, and the states seem equally powerless to accept any such thing.

At all events, this case ought to settle a puzzling question in practice, it being assumed that state courts will recognize the binding force of the Supreme Court decision in this case. As a matter of strict logic, however, it might be said state courts are not bound to recognize this ruling, because no strictly federal question is decided. The United States Supreme Court has not the right to dictate to a state court what it shall do in the conduct of cases before it, so far at least as state cases are concerned.

If a state court might conceive, contrary to what the Illinois court conceived in this case, that neither counts in a petition, one declaring on a cause of action under federal law and the other under state law, can be united, nor that a petition declaring only under federal law may by action of the judge be converted into a case under state law, this case hardly might be said to control it. It may, however, be fairly argued that the decision amounts to saying a federal law pertains to the intimate rights of a citizen, instead of a penalty under the commerce clause, and in this way the pleader may declare according to the varying phases of his proof.

May we ask, in conclusion, whether, if the pleader declares under state law, an Illinois judge could order the pleading amended, during the trial, to meet the proof, and verdict be rendered as of a suit brought under federal law? If we can do all of this, we begin to see the purpose of Congress vesting exclusive jurisdiction in such cases in state courts. If suit were brought in a federal court, want of diversity of citizenship might prevent recovery on a state law. If all of these things may be done as to an action under the liability act, why should not Congress take away from federal courts all kinds of cases where the proof might show they were brought on a misconception of the facts?

This case marks, or seems to mark, an important development in the union of remedies under state and federal law, and proves the superiority of state tribunals, in granting full relief to litigants, over the federal courts. Not only is this so as to their accidental jurisdiction by reason of the capacity of parties, but also as enforcers of remedies under federal law, where the personal rights of litigants are involved. It really seems impossible to make of a federal court a tribunal, where one may proceed, as if he were in a court of common law. There is too much that is artificial about such a court, and our form of government prevents its elimination.

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